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No. 94-1175

In the Supreme Court of the United States

OCTOBER TERM, 1994

BANK ONE, CHICAGO, N.A., PETITIONER

v.

MIDWEST BANK & TRUST COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Expedited Funds Availability Act, 12 U.S.C. 4001 *et seq.*, grants federal courts jurisdiction over inter-bank disputes concerning the collection of checks.

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This brief is filed in response to this Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

The Expedited Funds Availability Act (EFA Act), 12 U.S.C. 4001 *et seq.*, addresses aspects of the national system of payment by check and authorizes the Board of Governors of the Federal Reserve System "to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system." 12 U.S.C. 4010(f). The Board has set out liability

principles in Regulation CC, 12 C.F.R. Pt. 229. Petitioner Bank One, Chicago, N.A., sued respondent Midwest Bank and Trust Company in federal district court and sought to hold Midwest liable in damages for a violation of Regulation CC's requirements. The district court entered summary judgment for Bank One, Pet. App. 5-14, but the court of appeals vacated that judgment and ordered dismissal on the ground that the federal district court lacked jurisdiction over the dispute. *Id.* at 1-3.

1. Congress enacted the EFA Act as Title VI of the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 635, to speed up the availability of funds to bank depositors and to improve the Nation's check payment system. In the area of the check payment system, the EFA Act supplemented an established legal framework governing the interbank check collection process. That framework was constructed largely from state law (Articles 3 and 4 of the Uniform Commercial Code) that established basic legal rights and responsibilities respecting negotiable instruments, bank deposits, and collections. It also included a federal law component (Federal Reserve Board Regulation J) that regulated the process of collection and return of checks and other items handled through the Federal Reserve System. See Regulation J, 12 C.F.R. Pt. 210.

Congress enacted the EFA Act in response to public concern that banks were unduly delaying depositor access to deposited funds by placing temporary "holds" on those deposits. Bank depositors complained that they frequently encountered difficulties in using their checking accounts because of those holds. Banks imposed the holds to protect themselves against the risk that deposited checks

would not be paid, which risk resulted in part from inter-bank delays in the return of "bad checks." The longer that a bank was uncertain whether a check would be paid, the longer the bank maintained the hold to protect itself against the risk of nonpayment. See S. Rep. No. 19, 100th Cong., 1st Sess. 25-28 (1987).

The EFA Act responds to the problem in two ways. First, it imposes specific requirements on banks to hasten the availability of funds to depositors. The Act thus contains provisions setting out funds availability schedules, 12 U.S.C. 4002 (1988 & Supp. V 1993), schedule exceptions, 12 U.S.C. 4003 (1988 & Supp. V 1993), bank disclosure requirements regarding funds availability, 12 U.S.C. 4004, and other related provisions, 12 U.S.C. 4005-4006. Second, the Act authorizes the Federal Reserve Board to reduce the banks' nonpayment risk through improvements in the check payment system. The Act specifically authorizes the Board to consider various changes in its check processing system and to issue implementing regulations. 12 U.S.C. 4008. Because the EFA Act is designed against a background of existing state law governing check collection, it provides that the Board's implementing regulations shall supersede inconsistent state laws, including the Uniform Commercial Code. 12 U.S.C. 4007(b). See generally H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 177-182 (1987).

The EFA Act authorizes federal banking agencies to compel banking institutions within the agencies' respective jurisdictions to comply with the Act's statutory and regulatory requirements. See 12 U.S.C. 4009 (1988 & Supp. V 1993). Subsection 4009(a) authorizes enforcement primarily through Section 8 of the Federal Deposit Insurance Act,

12 U.S.C. 1818 (1988 & Supp. V 1993), which allows banking agencies to issue cease-and-desist orders, impose civil penalties, and pursue other sanctions. See 12 U.S.C. 4009(a) (1988 & Supp. V 1993). Subsection 4009(c)(1) grants the Federal Reserve Board residual authority to enforce any requirements that are not "specifically committed to some other Government agency under subsection (a) of this section." 12 U.S.C. 4009(c)(1). See H.R. Conf. Rep. No. 261, *supra*, at 183.

The EFA Act also contains civil liability provisions, which are the subject of this suit. See 12 U.S.C. 4010. Subsection 4010(a) addresses a depository institution's liability to a person or entity other than another depository institution. It states as follows:

> Except as otherwise provided in this section, any depository institution which fails to comply with any requirement imposed under this chapter or any regulation prescribed under this chapter with respect to any person other than another depository institution is liable to such person in an amount equal to the sum of [a prescribed measure of damages].

12 U.S.C. 4010(a). Subsection 4010(f) addresses a depository institution's liability to another such institution arising out of the payment system. It does not impose specific rights or establish a precise measure of damages, but instead states as follows:

> The Board is authorized to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system, including the receipt, payment, collection, or clearing of checks, and any related

> function of the payment system with respect to checks. Liability under this subsection shall not exceed the amount of the check giving rise to the loss or liability, and, where there is bad faith, other damages, if any, suffered as a proximate consequence of any act or omission giving rise to the loss or liability.

12 U.S.C. 4010(f). Subsection 4010(d) provides for federal court jurisdiction over civil liability suits, stating:

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year after the date of the occurrence of the violation involved.

12 U.S.C. 4010(d). The Board has implemented the EFA Act, including specification of the principles governing check collections, through Regulation CC. 12 C.F.R. Pt. 229. See 53 Fed. Reg. 19,433 (1988).

2. Petitioner Bank One (formerly First Illinois Bank and Trust) sued respondent Midwest Bank and Trust in federal district court, alleging that Midwest violated its duties under Regulation CC. Bank One's complaint stated that a Bank One customer had deposited a check drawn on a Midwest account. When Bank One submitted the check to Midwest through normal banking channels for collection, Midwest returned it for a guarantee of endorsement. Bank One provided the guarantee and made the funds available to the Bank One customer. Midwest later refused payment of the check based on insufficient funds in the Midwest payor's account. Bank One contended that Midwest violated its legal obligations by failing to provide timely notice that the payor

lacked sufficient funds to cover the check. Pet. App. 6-8, 18-19.

Midwest moved to dismiss Bank One's suit under Rule 12, Fed. R. Civ. P., on the ground that Bank One had failed to state a claim on which relief could be granted. See Pet. App. 20. The district court denied that motion, holding that Bank One had stated an actionable claim under the Federal Reserve Board's Regulation CC, which requires banks to "exercise ordinary care and act in good faith in complying with" Regulation CC's check collection requirements. 12 C.F.R. 229.38(a). See Pet. App. 20-22. The court ruled on cross-motions for summary judgment that "Midwest did not act with ordinary care in returning the check for guarantee of endorsement without first checking the sufficiency of the funds in support of the check." *Id.* at 12. It entered judgment for Bank One in the amount of $43,912.06. *Id.* at 15-16.

Midwest appealed. The court of appeals questioned during oral argument whether the federal district court had subject matter jurisdiction over the dispute. The court of appeals ordered supplemental briefing, and it later ruled that the EFA Act does not grant federal court jurisdiction over inter-bank disputes. Pet. App. 1-3. The court of appeals concluded that Congress had intended that those disputes would "be handled administratively" under Subsection 4009(c)(1), which grants the Federal Reserve Board residual authority to enforce requirements of the EFA Act that are not "committed to some other Government agency." 12 U.S.C. 4009(c)(1). The court held:

> Therefore, if plaintiff can state a colorable violation under the Regulations, it must make its case before the Board of Governors rather than the federal courts.

Pet. App. 2. The court vacated the judgment and ordered the district court to dismiss the action for lack of jurisdiction. See *id.* at 3.

Bank One petitioned for rehearing, and the Federal Reserve Board filed a brief as amicus curiae supporting that petition. The Board explained that Regulation CC contemplated that inter-bank civil liability claims would be cognizable in federal court, see 12 C.F.R. 229.38(g), and that the Board had not created an administrative mechanism for handling such claims. The court of appeals denied the petition for rehearing, but modified its opinion. It deleted the passage, quoted above, directing Bank One to "make its case before the Board," and it modified the paragraph that had contained that passage to state as follows (additions in italics):

> Disputes such as this, between members of the Federal Reserve system, are to be handled administratively before the Board of Governors of the Federal Reserve System pursuant to 12 U.S.C. § 4009(c)(1) *(or perhaps in state court)*. This conclusion is bolstered by the provisions of 12 U.S.C. § 4010(f), which authorize the Federal Reserve Board to establish liability among "depository institutions" such as these parties. *Although the Board of Governors has informed us that no mechanism is currently available for administrative resolution of such disputes, the Board's differing interpretation of this statute cannot confer jurisdiction upon the Court.*

Pet. App. 24-25.

DISCUSSION

The United States agrees with petitioner that the court of appeals erred in concluding that the EFA Act does not grant federal courts jurisdiction to resolve inter-bank civil liability suits. The court has adopted an implausible construction of the EFA Act that is likely to impair the statute's remedial objectives. The court's decision denies litigants in the Seventh Circuit the federal judicial forum that Congress expressly provided, and it may become an ongoing source of confusion in the banking community. Although this is the first court of appeals decision on the issue and there is no circuit conflict, we believe that it would nevertheless be appropriate for the Court to grant the petition for a writ of certiorari in order to clarify the Act's jurisdictional framework.

1. The EFA Act establishes a civil liability regime for violations of the statute and implementing regulations. 12 U.S.C. 4010. In the case of inter-bank disputes, the Act expressly authorizes the Board "to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system." 12 U.S.C. 4010(f). The precise issue here is whether the Act directs the Board to prescribe an inter-bank cause of action that would be adjudicated through the courts, or to create an inter-bank remedy that would be administered extra-judicially by the Board itself.

The Federal Reserve Board has concluded that Congress intended the Board to create a cause of action that would be pursued through the courts. Congress addressed the question of the appropriate forum for civil liability actions through Subsection 4010(d) of the EFA Act, which states:

> Any action under *this section* may be brought in any United States district court, or in any other court of competent jurisdiction.

12 U.S.C. 4010(d) (emphasis added). That jurisdictional provision extends to all of Section 4010's subsections, including Subsection (f), which authorizes the Board to "impose" or "allocate" inter-bank "liability" in connection with the check payment system. 12 U.S.C. 4010(f). Congress's grant of judicial jurisdiction over "[a]ny action under" Section 4010 indicates that Congress delegated to the Board the quasi-legislative role of prescribing the standard of liability for inter-bank check payment disputes, but preserved the courts' traditional role of adjudicating those disputes. Simply put, the Board prescribes the inter-bank liability standard, which the courts then apply. See 12 C.F.R. 229.38(g).

The Board's construction is consistent with the general structure of Section 4010, which addresses both depositor and inter-bank disputes. Congress was familiar with depositor complaints respecting fund availability, and it dictated the precise standard of liability and the measure of damages that would govern depositor claims. See 12 U.S.C. 4010(a). But Congress apparently recognized that inter-bank check payment disputes could raise technical issues within the Board's specialized knowledge, and it therefore delegated authority to the Board to establish the precise standard under which one bank could hold another bank liable for damages. See 12 U.S.C. 4010(f). Congress relied on the Board to employ its expertise in an extensively regulated area to determine the appropriate contours of an inter-bank cause of action. Congress provided no reason to

doubt, however, that both depositor disputes and inter-bank disputes would be adjudicated in a judicial forum in accordance with Subsection 4010(d), which grants the federal and state courts concurrent jurisdiction over civil liability claims. See 12 U.S.C. 4010(d).

The court of appeals' contrary ruling—which holds that Congress not only gave the Board authority to define the standard of liability, but also the power to adjudicate specific claims—would vest the Board with a highly unusual power. Congress routinely authorizes federal agencies to establish criteria that determine whether one private party is civilly liable to another in a judicial action. See, *e.g.*, Securities Act of 1933, 15 U.S.C. 77k (imposing civil liability for failure to provide registration information required by the Securities and Exchange Commission); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607(a)(4)(B) (imposing civil liability for environmental response costs that are consistent with the Environmental Protection Agency's national contingency plan). But Congress does not normally vest an administrative agency with authority to adjudicate purely private disputes. If Congress wished to confer that power on an administrative agency, it would be expected to do so explicitly. See Commodity Exchange Act, 7 U.S.C. 18 (1988 & Supp. V 1993); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919.

This Court indicated in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), that it would not lightly infer that Congress has vested an administrative agency with the power to adjudicate private disputes. The Court ruled in *Coit* that the Federal Savings and Loan Insurance Corporation

(FSLIC) lacked authority to establish an administrative claims forum to adjudicate creditors' claims against insolvent thrift institutions. *Id.* at 572-579. The Court explained that "when Congress meant to confer adjudicatory authority on FSLIC it did so explicitly and set forth the relevant procedures in considerable detail." *Id.* at 574. It noted that the FSLIC's authorizing statute contained no such provisions in the case of creditor claims. *Ibid.* Like the statutory provisions in *Coit*, the civil liability provisions of the EFA Act are devoid of indicia demonstrating that Congress intended to vest the Board, rather than the courts, with authority to adjudicate inter-bank disputes. See 12 U.S.C. 4010.

The court of appeals suggested that the Board could exercise such power "pursuant to 12 U.S.C. § 4009(c)(1)," which grants the Board residual authority to "enforce" the EFA Act. See Pet. App. 2, 24-25. Section 4009, however, addresses "[a]dministrative enforcement"—not civil liability—and it authorizes banking agencies to use traditional agency enforcement tools, including cease-and-desist orders and civil sanctions, to compel compliance with the Act. See H.R. Conf. Rep. No. 261, *supra*, at 183 ("[Section 4009] requires the Federal banking regulators to use existing administrative enforcement mechanisms to enforce compliance with [the EFA Act]."). That Section, including Subsection (c)(1), creates no mechanism for the adjudication of inter-bank civil liability claims.

This Court's decision in *Coit* indicates that the EFA Act's administrative enforcement provisions should not be construed to authorize administrative adjudication of private disputes. The Court recognized in *Coit* that the FSLIC had similar

enforcement powers. 489 U.S. at 574. The Court nevertheless treated those powers as distinct from any authority to adjudicate disputes between private parties. See *ibid.* The same result should follow here. Subsection 4009(c)(1) does not contain any reference to administrative adjudication of private disputes, any reference to the Administrative Procedure Act, or any provision for judicial review. It is therefore unlikely that Congress intended that provision to authorize the creation of a novel administrative claims tribunal for inter-bank check collection disputes. See *Coit*, 489 U.S. at 574.

The court of appeals' decision here is additionally questionable because it rejects a reasonable construction of the EFA Act by the agency principally charged with its administration. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). This Court accords "substantial deference" to the Federal Reserve Board's interpretation of banking statutes that the Board administers "whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent." *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 207, 217 (1984); see *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 68 (1981); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971).

The Board has concluded that the EFA Act does not compel administrative adjudication of inter-bank check collection disputes, and in the absence of controlling indications of contrary legislative intent, the court of appeals should have given deference to the Board's interpretation. The Board is the agency that Congress charged with implementing the statute

from its inception, and that agency's reasonable and contemporaneous construction would normally "carry the day against doubts that might exist from a reading of the bare words of a statute." See, *e.g.*, *Good Samaritan Hospital* v. *Shalala*, 113 S. Ct. 2151, 2159 (1993), quoting *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

In rejecting the Board's views, the court of appeals has conferred novel powers on the Board that the Board itself disavows and has replaced the Board's understanding of the statute's division of responsibilities with a highly unusual jurisdictional scheme. Under the Board's construction, all check-related claims may be raised in a single judicial tribunal—either in federal court, which would have pendent jurisdiction over state claims (including Uniform Commercial Code claims embodying standards established by Regulation CC), or in a state court of competent jurisdiction. The court of appeals' decision, on the other hand, envisions that federal and state courts would adjudicate depositor claims, but that the Board (or other banking agencies with power to "enforce" the Act) would adjudicate inter-bank claims under the EFA Act, while state courts would adjudicate inter-bank state law claims under the Uniform Commercial Code (and "perhaps" claims under the EFA Act). Pet. App. 25. It is unlikely that Congress meant to fragment adjudicative responsibilities in that way.

2. The Seventh Circuit is the first court of appeals to address the question whether federal courts have jurisdiction under the EFA Act respecting inter-bank check collection disputes. There is accordingly no conflict among the courts of appeals on that question of statutory construction. This Court ordinarily does

not grant a petition for a writ of certiorari to address a statutory question of first impression. We nevertheless believe that it would be appropriate for the Court to grant review on the issue presented by this case at this time.

The court of appeals' decision is clearly wrong, and it conflicts in principle with this Court's decision in *Coit*. The decision has the practical consequence of denying litigants the federal judicial forum that Congress expressly provided. That consequence is mitigated to some extent by the language in the court's amended decision, which does not require the Board to establish an administrative tribunal to adjudicate inter-bank claims and leaves open the possibility that those claims could be litigated in state courts. The Seventh Circuit's decision will nevertheless directly impair the availability of the EFA Act's remedies in a major banking center, and it may create needless confusion in the national banking community over the application of the statute. The ultimate effect may be to diminish the effectiveness of the Board's check collection rules. While the Court could await the development of a conflict among the courts of appeals on the question presented here, we do not expect that postponement of a decision on the matter would benefit the Court's consideration of the issue in any significant way.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1995